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Abstract

In Australia, Aborigines and Torres Strait Islanders have made much less use of the courts in the struggle for recognition of their rights to the land than, for example, the Indians in North America have. There have only been two major landrights cases in Australia; the first one, Milirrpum and others v. Nabalco and the Commonwealth, was brought by the Yolngu of north-eastern Arnhemland in 1969 in protest against the granting by the federal government of a mining lease to Nabalco on their land. The case was decided by the Supreme Court of the Northern Territory in 1971. The second case, Mabo and others v. the State of Queensland was an action initiated in 1982 by the Meriam people from the Torres Strait Islands to prevent an increase in government powers over their land. The case was finally decided in the High Court of Australia in June 1992.

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In Australia, Aborigines and Torres Strait Islanders have made much less use of the courts in the struggle for recognition of their rights to the land than, for example, the Indians in North America have. There have only been two major landrights cases in Australia; the first one, Milirrpum and others v. Nabalco and the Commonwealth, was brought by the Yolngu of north-eastern Arnhemland in 1969 in protest against the granting by the federal government of a mining lease to Nabalco on their land. The case was decided by the Supreme Court of the Northern Territory in 1971. The second case, Mabo and others v. the State of Queensland was an action initiated in 1982 by the Meriam people from the Torres Strait Islands to prevent an increase in government powers over their land. The case was finally decided in the High Court of Australia in June 1992.

In both cases, the central issue was whether the common law inherited from Britain recognized the existence of indigenous title to the land. It was attempted to prove that this title had survived the acquisition of sovereignty by the British and that, although very different from the individual title of the ordinary landowner among white Australians, the indigenous communal rights to the land were of a kind recognizable by the Australian legal system.

Judge Blackburn in Milirrpum v. Nabalco decided most of the issues involved in the case against the Aborigines. Most importantly, he found that the Australian common law did not and never had recognized any rights to the land as residing in the Aborigines. The decision thus seemed to indicate that litigation had little to offer Aborigines in this area. However, this judgement was reversed when the High Court in the Mabo-case decided that the common law did recognize the existence of 'communal native title'; in the decision some long-standing legal doctrines were rejected.

This development raises some interesting questions about judicial decision-making, such as what determines the way in which decisions are

made and what is actually the function of the judge. A discussion of these factors in relation to the landrights cases touches on some fundamental aspects of the legal process.

In general, the legal system is designed to maintain certain standards of social interaction; as such it is based on the moral assumptions current in society. In ordinary cases, the judge need not consider this underlying element, but will be able to resolve the issues by applying a body of accepted legal rules, laid down in earlier judgements or statutes. However, in extraordinary cases, where there is no agreement about what the law is, the decision of the case is a much more complicated task. Judges will examine previous decisions to find principles of law which are relevant to the case before them. As pointed out by many legal theorists,[1] they will also by guided by notions of what is fair, just or desirable as they are perceived by the legal profession and the population in general. Ultimately, this means that in 'hard' cases the decision is to a considerable extent determined by the moral principles underlying the legal system.

This applies to the Australian landrights cases; in the context of these cases, however, it is important to call attention to an even more fundamental source of influence on the decision. It is probably obvious that legal as well as moral principles are culturally determined; they are necessarily directed towards the continued existence and development of the culture of which they are expressions. At the most basic level, judges are influenced by the cultural background of the legal system and by their own cultural heritage in general. This is always so, but in the present context it acquires supreme importance. When groups of people such as the Aborigines or the Islanders involuntarily become subject to a legal system other than their own, this by definition involves a confrontation in court as well as elsewhere between two different cultures; on the one hand that of the indigenous people, on the other that of the 'colonizers'. When it is recognized that the legal system itself is a dynamic part of the latter, it becomes clear that a very fundamental cultural bias may easily influence the outcome of the litigation process.

There were signs of this cultural influence in Blackburn's decision of Milirrpum v. Nabalco. It was, for instance, an important factor in his findings on the Aboriginal land tenure system.

In spite of Blackburn's obvious goodwill and best intentions to grasp the very complicated Aboriginal land system, he was basically incapable of understanding it on its own premises. Without realizing it he was unable to put aside his habitual, culturally defined model for understanding the world. The judge's discussion of the antiquity of Aboriginal links with the land provides an example of this. The Yolngu had to prove that the same clans were connected with the same land as they had been in 1788 when the colony of New South Wales came into existence. It turned out that some clans had died out and Blackburn therefore concluded that the relationship was no longer the same. To the Aborigines, on the other hand, no

change had taken place. Their system of succession, based on the mythology of the Dreamtime, in such situations dictates the transfer of land along indirect descent lines, so the land in question had remained in the possession of its rightful owners. Blackburn, however, maintained that 'the issues before the court are such that the mere existence of the possibility of a historical explanation – if such a possibility exists ... is of considerable importance'.[2]

By suggesting that 'factual' historical explanations of changes were more important to the court than mythological ones, he was removing the issue outside the system within which it existed. In Aboriginal philosophy, mythology and history cannot be separated, they are simply one. Rather than accepting the system at face value, Blackburn wanted the individual elements to be explicable in terms which were acceptable to the common law.

Another instance of this was the judge's rejection of the plaintiffs' claim that their notions of ownership could be characterized as proprietary. Although the judge in one of the most notable findings of the decision recognized that the Aboriginal system constitued a 'system of law' (which the defendants had claimed it did not), he held that Aboriginal relations with the land did not conform sufficiently to the ideas of land ownership known to him to be termed a 'proprietary right'.[3] There is little doubt that a concept of property as a private economic interest exercized considerable influence on the judge in deciding this issue. This notion of property, far from being a universal principle, is firmly embedded in the agrarian mode of subsistence of a group of closely related societies based on what we today term European or Western culture. In Blackburn's reasoning a Eurocentric legal framework based on this development left little or no room for the different concept of ownership held by a hunter-gatherer community such as that of the Yolngu.

Other evidence of the marked influence of Blackburn's cultural background appeared in his treatment of various historical material; as the historian, Henry Reynolds, has pointed out, it showed Blackburn to represent an Australian historical tradition which consistently has held that in the past no official attempt was ever made to recognize Aboriginal title to the land.[4]

Reynolds particularly refers to Blackburn's discussion of government attitudes in connection with the founding of the colony of South Australia in 1836. Blackburn at the most found indications of a 'principle of benevolence' in government actions,[5] whereas Reynolds has argued convincingly that the colonial office was concerned about the *legal* rights of the Aborigines.

Another historical event which Blackburn mentioned was 'Batman's Treaty' from 1835, in which a colonist claimed to have bought some land from the Aborigines. Blackburn saw the government nullification of the 'treaty' as a sign of official rejection of Aboriginal title to the land;[6] but it

is, in fact, much more reasonable to see it as a confirmation of the principle that British subjects could only acquire land through a grant from the Crown, than as a denial of Aboriginal landrights. It seems to be another indication of the influence of a particular historical tradition which has attempted to strengthen white claims to the land by simplifying government attitudes (especially those current during the 1830s and '40s).

The ultimate cementing of this tradition was Blackburn's refusal to consider recent historical research, which has thrown new light on the early colonization of Australia. This was particularly relevant in connection with the discussion of the legal categorization of the colony of New South Wales. It has been maintained in the courts of Australia that it was a so-called colony of settlement, legally to be regarded as *terra nullius* (no-man's land). In the words of the Privy Council in 1889 it was 'a colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions'.[7]

Although historical research has proved beyond doubt what the Aborigines always knew, that the country was not 'practically unoccupied', not 'without settled inhabitants or settled law', and far from 'peacefully annexed', Blackburn felt unable to depart from the decision of the Privy Council; he said 'the question is not one of fact but of law ... it is beyond the power of this court to decide otherwise than that New South Wales came into the category of a settled or occupied colony'.[8] The judicial acceptance of the doctrine of *terra nullius* which can only be termed a legal fiction, is an example of the Eurocentric foundations of the law. Perhaps better than anything this exposes the difficulties facing Aboriginal litigants in the Australian legal system.

The opholding of the Privy Council decision is also a powerful example of the significance of precedent in the judicial process. Blackburn relied heavily on previous decisions on the main issue, that is, common law recognition of indigenous title. Because there were no decisions on this issue from Australia, he examined judgements in similar cases from other common law countries such as the USA, Canada, and New Zealand as well as Privy Council decisions from Africa and India, stretching from the early 19th century to the present; the many decisions are not easily reconcilable. Some of them have contained what seems like clear recognition of indigenous title as a legal right (e.g. Johnson v. McIntosh and Worcester v. State of Georgia, USA and Regina v. Symonds, New Zealand), whereas others seem just as clearly to reject the same notion (e.g. Tee-Hit-Ton v. the United States, USA, the early stages of Calder v. the Attorney-General, Canada and Wi Parata v. the Bishop of Wellington, New Zealand).

Blackburn's treatment of these decisions leaves the impression that the cases which have been considered by many scholars to uphold common law recognition of indigenous title, he found unpersuasive or distinguishable from the Australian sitiuation; on the other hand, judgements (some

of them much criticized) unfavourable to the concept, he found persuasive. It is thus possible to discern a certain line in Blackburn's interpretation of other judgements. Yet Blackburn indicated several times that he felt compelled by the precedent to reach the conclusions he did, sometimes even seeming to regret the result.[9]

These two observations seem contradictory; in fact, they reflect two diverging views among legal theorists on the nature of the doctrine of precedent. In traditional jurisprudence it is often maintained that in all cases turning on a point of law it is possible to discover one or more reasons determining the decision (the *ratio decidendi*), which are applicable in later cases according to certain rules.[10] This implies that the discovery and application of such *rationes*, although possibly demanding on the judge, is nevertheless a fairly straightforward business. This view is related to the general tradition, in existence among the English legal profession for centuries, that the judiciary do not play an active law-making role, but merely arrive at their decisions through legal reasoning. The law contains all the principles and rules necessary to determine any case; the job of the judge is to discover what the law is, not to create it. These ideas were to a certain extent reflected in Blackburn's words.

It is a tradition, however, which leaves little room for what the Australian professor of law, Julius Stone, calls 'the leeways of choice'.[11] This idea is based on a recognition of the fact that judges must constantly make choices when establishing the *rationes* of previous decisions – exactly how should the words be understood? In what way were the legal propositions applied? What was in fact the central element of the decision? and so on. The process of choice-making also covers the application of precedent to the case before the judge. Stone emphasizes that the element of choice cannot be avoided, it is simply a part of the doctrine of precedent. Thus, in his judgement Blackburn made a number of choices of interpretation and distinguishment which produced a particular reading of precedent. Once it is openly recognized that the judge is not merely mechanically applying the law, it becomes clear that, to a limited extent, the judge may have a law-making function. This again makes it important to consider what determines the way in which he or she makes the choices involved in the decision.

Some legal theorists, especially the so-called realists in the USA, have underlined the influence of ideologies and values, or even personal beliefs, on judicial decisions. There is generally a strong reaction in the legal profession against such emphasis on subjectivity in decision-making. Julius Stone, too, while not denying that judges have personal value commitments and that they do and should take extra-legal factors into consideration, seems to consider that these personal views are largely balanced by 'steadying factors'. Judges will be kept in line by the need and desire to conform to the standards for judicial behaviour as well as to the procedural rules laid down and accepted by the legal profession. Furthermore,

it is claimed, judges in a democratic society will be influenced by current opinion ensuring that their judgement will be acceptable.[12] This ties up with the point made earlier that, ultimately, judges will base their judgement in difficult cases on the moral and cultural assumptions underlying the legal system. In the final analysis, Blackburn's decision on precedent was determined by his cultural background to as large an extent as his reasoning on anthropological and historical material. Although Blackburn did not harbour any of the discriminatory attitudes towards Aborigines which have been common in Australia, his judgement in several ways reflected the long tradition of denying Aborigines their rights.

One of the major implications of what has been said so far, however, is that a potential for change is an integral part of the judicial process. As Stone points out, the principle of binding the courts to previous decisions is inherently conservative, yet that same principle also contains elements which enables the common law to develop, through the judge, along with the rest of society. The choices of interpretation facing the judge imply that in many cases alternative, even opposing interpretations of precedent are possible (as, indeed, many legal scholars have claimed in connection with Milirrpum v. Nabalco). Furthermore, it has been argued here that an important element which may influence the judge's reasoning is a kind of cultural 'blockage' which can predetermine the judge's understanding of the issues. If this is correct, it follows that greater awareness among jurists as well as the general public of such ethnocentrism could radically alter the outcome of similar cases.

That these are not frivolous or utopian ideas is proved by recent developments. The Mabo-case is the latest example of this, but other cases since Milirrpum v. Nabalco have indicated a change of attitude in judicial attitudes.

In Australia, Coe v. the Commonwealth from 1977 was an attempt by the Aboriginal people, represented by Poul Coe, to challenge the sovereignty over Australia of the Commonwealth Government. The claim was that the Aborigines were in sovereign possession of Australia in 1788 and had never ceded this to anyone. For various reasons the case was dismissed, but in the process of reaching this decison, two of the judges of the High Court, Murphy and Jacobs, made some comments which are relevant in the present context. Although they rejected the challenge to the sovereignty of the Commonwealth, they would both allow a discussion of the colonial status of Australia. In particular, Murphy rejected the application of the concept of *terra nullius* to Australia or any other inhabited country. He also rejected the Privy Council statement from 1889 that Australia was acquired by 'peaceful annexation':

> The Aborigines did not give up their lands peacefully; they were removed forcefully from the lands by United Kingdom forces or the European colonists in what amounted to attempted (and in Tasmania almost complete) genocide. The statement

> by the Privy Council may be regarded as having been made in ignorance or as a convenient falsehood to justify the taking of the Aborigines' land.[13]

In this manner, the judge was prepared to allow the influence of recent historical research on his decision on the applicability of earlier judicial statements. This suggested a most important change.

This seems to have been part of a broader development in the common law countries. In Canada, where there have been many more court cases in which Indians and Inuit have tried to obtain recognition and enforcement of their rights, the majority of the Supreme Court of Canada in 1973 found that Indian title to the land did exist as a legal right. The case, Calder v. the Attorney-General, was based on an application by the Nishga Indians of British Columbia for a declaration that their title had never been extinguished. Their application had been rejected in British Columbia by the Supreme Court as well as the Court of Appeal; although the action was dismissed on a technicality by the Supreme Court of Canada, the general recognition of Indian title was a significant statement by the court. One of the judges, Hall, said: 'the Nishgas in fact are and were from time immemorial a distinctive cultural entity with concepts of ownership indigenous to their culture and capable of articulation under the common law.'[14]

Hall also offered an important comment on the role played by modern research:

> The assessment and interpretation of the historical documents and enactments tendered in evidence must be approached in the light of present-day research and knowledge disregarding ancient concepts formulated when understanding of the customs and culture of our original people was rudimentary and incomplete and when they were thought to be wholly without cohesion, laws or culture, in effect a sub-human species.[15]

By distancing himself from the prejudice of especially some late 19th and early 20th century judicial statements, Hall indicated the importance of awareness of the judge's underlying, perhaps even subconscious, attitudes towards the indigenous population. In Guerin v. the Queen from 1984, the Supreme Court of Canada stated that the Indian title to the land should be understood according to the Indian system (*sui generis*) rather than be described in terms of the European law of property.[16] In this way both decisions made steps towards understanding the indigenous system in its own right.

These and several other cases show that the 1970s saw the growth of a line of judicial thinking which was prepared to allow reconsideration of hitherto unquestioned doctrines if they were contrary to modern 'ideas of justice'. It also encouraged greater awareness of the cultural foundation of such notions as property, in order to avoid an unreasonable demand for conformity by indigenous systems to concepts totally foreign to them. As

will be seen, both aspects of this 'new judicial attitude' were present in the decision of the Mabo-case.

An initial victory was gained by the plaintiffs in the High Court in 1988 when it was found by the Court that the *Queensland Coast Declaratory Act 1985* enacted by the government in response to the action by the Islanders was inconsistent with the Commonwealth *Racial Discrimination Act* and thus invalid. The Queensland act claimed that all traditional rights to the land were extinguished without right to compensation when the Torres Strait Islands were annexed in the 19th century. The general importance of the High Court finding was pointed out by one of the judges:

> ... this means that if traditional native title was not extinguished before the *Racial Discrimination Act* came into force, a State law which seeks to extinguish it will now fail ... because section 10(1) of [that Act] clothes the holders of traditional native title who are of the native ethnic group with the same immunity from legislative interference with their enjoyment of their human right to own and inherit property as it clothes other persons in the community.[17]

In other words, indigenous title still existing is protected against arbitrary extinguishment without compensation by the *Racial Discrimination Act.* Clearly an important finding.

It remained to be decided, however, if Islander title had survived annexation. This essential point was decided in the affirmative by six judges, one judge dissenting, in the High Court in June 1992. The main finding of the court was that 'the common law of this country recognizes a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws and customs, to their traditional lands'.[18]

This finding represents a dramatic change in Australian legal thinking on indigenous landrights. In reaching their decision, the judges considered some of the judgements from other common law courts dealt with by Blackburn; apart from the dissenting judge, they all interpreted them in a way which supported the recognition by the common law of 'communal native title'. The High Court thus overruled the conclusions reached by Blackburn.

The attitude underlying this reading of precedent was spelled out in the process of rejecting some well-established legal propositions of Australian law. The reasons for judgement written by Brennan deal with this in detail. The line of argument which he followed in order to recognize the continued existence of indigenous title was that the British Crown had acquired the underlying, 'radical' title to the land , but not full possession ('beneficial ownership'). The Crown's title was thus not inconsistent with indigenous title, which to the extent that it had not been extinguished by legislation or inconsistent grants to others, continued to exist.

This, however was in opposition to several Australian judgements, which have held that upon acquisistion the Crown gained full ownership of the

land, thus constituting a serious procedural obstacle. To recognize indigenous title meant rejecting these judgements. Brennan saw the problem in the following way:

> In discharging its duty to declare the common law of Australia, this Court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency.... The peace and order of Australian society is built on the legal system. It can be modified to bring it into conformity with contemporary notions of justice and human rights, but it cannot be destroyed. It is not possible, *a priori*, to distinguish between cases that express a skeletal principle and those which do not, but no case can command unquestioning adherence if the rule it expresses seriously offends the value of justice and human rights (especially equality before the law) which are aspirations of the contemporary Australian legal system. If a postulated rule of the common law expressed in earlier cases seriously offends those contemporary values, the question arises whether the rule should be maintained and applied. (pp. 16-17)

Consequently, Brennan proceeded to examine the cases which have established the full ownership of land of the Crown.

Brennan is quoted at length because the reasoning of the judge here shows with great clarity the way in which the judicial process allows scope for the development of the law when attitudes in society demand it. The judge is able to find that because precedent (which has not formerly been questioned) is at odds with '*contemporary* notions of justice and human rights' it is required that the legal system re-examines that precedent. This reasoning bears out the claim by legal theorists noted earlier that judges are guided by 'principles of what is fair, just or desirable'. It is hardly surprising, given the words the judge uses, that he finds that 'none of the grounds advanced for attributing to the Crown an universal and absolute ownership of colonial land is acceptable' (p. 43). Upholding the precedent and thus finding that one of the 'skeletal principles' of Australian law offends notions of justice and human rights would surely have been an unacceptable finding to have been reached by the highest court of the nation.

Perhaps an even better example of the ability of the court to depart from established legal opinion was the rejection of the doctrine of *terra nullius*. Brennan reviewed the process by which the concept of no-man's land came to be applied to countries inhabited by hunter-gatherers and other indigenous peoples and recognized that this was based on the belief that indigenous peoples were considered uncivilized and therefore not to be taken into account. He then said: 'The facts as we know them today do not fit the "absence of law" or "barbarian" theory underpinning the colonial reception of the common law of England. That being so, there is no warrant for applying in these times rules of the common law which were the product of that theory' (p. 27).

Acknowledgement of the importance of the 'facts as we know them today' is clearly a repudiation of Blackburn's conclusion on this issue and an endorsement of the trends noted in the cases of the 1970s mentioned earlier. Having remarked that the whole theory of *terra nullius* was 'false in fact and unacceptable in our society', the judge said: 'Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted' (p. 30). In this way Brennan rejected a legal fiction which had become unacceptable in society. The words used by Deane and Gaudron were even stronger:

> The acts and events by which [the] dispossession [of the Aborigines] in legal theory was carried into practical effect constitute the darkest aspect of the history of this nation. The nation as a whole must remain diminished unless and until there is an acknowledgement of, and retreat from, those past injustices. In these circumstances the Court is under a clear duty to re-examine the two propositions [*terra nullius* and the full ownership of the land by the government] ... that re-examination compels their rejection. (p. 100)

Dawson (the dissenting judge), however, rejected any ability of the judiciary to change the law. Although he recognized that relations between Aborigines and whites have left a stain on Australian history he said:

> The policy which lay behind the legal regime was determined politically and however insensitive the politics may now seem to have been, a change in view does not of itself mean a change in the law. It requires the implementation of a new policy to do that and that is a matter for government rather than for the courts. In the meantime it would be wrong to attempt to revise history or to fail to recognize its legal impact, however unpalatable it may now seem. (p. 138)

The judge admitted that the attitude towards the issue has changed (he mentioned 'the degree of condemnation which is nowadays apt to accompany any account [of the past]' (p. 138) but denied any obligation on the part of the court to take this into consideration. He clearly questioned the attempt by the other judges to change the direction of the law. Had this attitude been taken by the majority, so that indigenous title had been rejected, Aborigines and Islanders would at the very least have lost complete confidence in the Australian legal system.

As a final indication of the 'new thinking' in the judgement, it may be mentioned that all the judges attempted to deal with the nature of indigenous interests in the land in a way which recognized their independent character. Perhaps the most significant statement on this question was made by Toohey. He criticized the demand that indigenous title should conform to notions of private property in order to be recognizable. On the contrary he felt that 'inquiries into the nature of traditional title are essentially irrelevant'. According to the judge, the common law recognizes

indigenous title as soon as its existence has been established by showing a recurrent pattern of physical presence on the land. In Toohey's words: 'Thus traditional title is rooted in physical presence. That the use of the land was meaningful must be proved but it is to be understood from the point of view of the members of the society' (p. 186). The judicial recognition that in this kind of case one must not blindly apply the concepts of the judge's own legal system to another system is of great significance.

Thus it may be concluded that the decision of the Mabo-case reflects a growing awareness in the Australian judiciary of the need for a culturally unbiased approach to the understanding of indigenous principles of land-ownership. It also reveals an attitude among a majority of the judges to the issues which enabled them to reinterpret and even depart from precedent in order to recognize the existence of Aboriginal and Torres Strait Islander title to the land. It clearly shows that the judges were influenced by the need, increasingly seen by sections of the population, for the Australian nation to come to terms with the impact of colonization on the indigenous peoples of the country. In this respect, the case has demonstrated the ability of the judicial process to create changes in the law in exceptional circumstances. The case has not resolved all the problems facing Aborigines and Islanders trying to recover the land they have lost; however, there is little doubt that the rejection by the High Court of some of the long-lived fictions which have justified the dispossession of these peoples will be of great significance in the future development of relations between the indigenous population and the rest of the Australian population.

NOTES

1. See for example R.M.Dworkin(ed): *The Philosophy of Law* (Oxford University Press, 1977) and N.MacCormick: *Legal Reasoning and Legal Theory* (Clarendon Press, Oxford, 1978).
2. Milirrpum and others v. Nabalco Pty.Ltd. and the Commonwealth of Australia, *Federal Law Reports*, vol. 17, 1971, pp. 141-294, p. 193.
3. Ibid., pp. 267-268 and pp. 270-272.
4. H.Reynolds: *The Law of the Land* (Penguin Books, Australia, 1987), esp. pp. 121-124.
5. Milirrpum v. Nabalco, op.cit., p. 281.
6. Ibid., p. 257.
7. Cooper v. Stuart, *Law Reports, Appeal Cases, House of Lords and Privy Council*, vol. XIV, 1889, pp. 286-294, p. 291.
8. Milirrpum v. Nabalco, op.cit., p. 244.
9. Ibid., pp. 217, 244, 245, 273, 293.
10. For an authoritative treatment of precedent see R.Cross: *Precedent in English Law* (Clarendon Press, Oxford, 1977).
11. J.Stone: *Precedent and the Law, Dynamics of Common Law Growth* (Butterworths, Sydney, 1985).

12. Ibid., pp. 88-89.
13. Coe v. the Commonwealth of Australia and another, *Australian Law Reports*, vol. 24, 1979, pp. 118-138, p. 138.
14. Calder et al. v. the Attorney-General of British Columbia, *Dominion Law Reports*, vol. 34 (3rd series), 1973, pp. 145-226, p. 190.
15. Ibid., p. 169.
16. Guerin et al. v. the Queen, *Dominion Law Reports*, vol. 13 (4th series), 1984, pp. 321- 369, p. 339.
17. Eddie Mabo and another v. the State of Queensland and another, 1988, F.C. 88/062 (High Court of Australia), p. 34.(Later published in *Commonwealth Law Reports*, vol. 166, p.186.)
18. Eddie Mabo and others v. the State of Queensland, 1992, F.C. 92/014 (later to be published in *Commonwealth Law Reports*), p. 1. All further references to this report are included in the text.

Mark O'Connor

PORT ESSINGTON (NT)*

Nowhere is the sea so entrappped by land,
a smooth basin flooding and draining silently.
Here the tailed, keeled reptile-shape is best.

Kunapipi, that old Snake-Lady,
has swallowed an endless plain,
spews back a third at each low tide.

This lace-coast, froth-land
mixed with sea, sea patterned with land,
tide country, crocodile-totem land,
turns fresh-water floodplain, or salt-marsh
as snows thicken or thin on Antarctica.
An ocean with ripples in place of waves
echoes and gurgles against clay cliffs.
The air is a warm-mousse
kiss, above soft waves friendly to the turtle
and the bark-mat canoe with turned-up sides.
In its shallows the stingray slides easily,